IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 463 OF 2006

IN

SUIT No. 925 of 1990

Sh.Vadiraj Naggappa Vernekar since dec. through its LRs
Smt. Shantabai V. Vernekar & ors. .. Plaintiffs

versus

Sharad Chandra Prabhakar Gogate .. Defendant

...

Mr.Jaideep Lele i/b Crawford Bailey & Co. for the plaintiff in support.

Ms.K.N. Velankar for the defendant.

CORAM : D.G. KARNIK, J

DATED : 7th July 2006.

P.C.:

1. This motion is taken out by the plaintiff for recalling its witness Mr.Sadanand Shet who was examined as a Constituted Attorney of the plaintiff. It is alleged that Mr.Shet is the only witness to the transaction and there is no other person available to depose regarding the suit transaction. Counsel further submits that vital questions necessary for proving the

plaintiff's case were omitted to be asked to the witness in the examination in chief. The previous advocate of the plaintiff is blamed for this lapse. According to the plaintiffs, previous advocate did not perform his duty properly and did not bring on record the necessary facts. Counsel submits that the plaintiffs should not suffer for the lapse of their previous counsel. Counsel relies upon the decision of a Single Judge of the Punjab & Haryana High Court in Om Prakash vs. Sarupa reported in AIR 1981 Punjab 157 in support.

2. In Om Prakash Vs. Sarupa (Supra), an attesting witness to a will was examined but vital questions relating to the attestation were not put to him. It was held by a learned single Judge that a party should not be allowed to suffer for any omission or lapse on the part of the counsel and therefore, permission was given for recalling of the witness. In my view, the case is distinguishable. That was a case relating to the attestation of a will. Section 68 of the Evidence Act provides that a will shall not be admitted in evidence until one attesting witness atleast has been examined for the purpose of proving the execution. Thus, there is no statutory requirement to proof of a will only by examining one of the

attestating witness. This is not the case here. The document in question, for proof of which the witness is sought to be recalled, is not a will. In the present case, the witness who is sought to be recalled is not an attesting witness. In fact, he was examined as a Constituted Attorney of the plaintiffs. He appears to be an interested witness. Therefore, the case is distinguishable on facts.

3. When a witness is examined in the Court, by oversight a question may not be put to him in the examination in chief. In the present case, examination in chief was not before the court but an affidavit in lieu of examination in chief was filed. Affidavit was prepared after due deliberations and witness had ample opportunity of pointing out if anything remained to be stated in the affidavit in lieu of examination in chief.

4. In my view, the present motion is taken out to fill up the lacunaes in the examination left in the examination in chief of the witness which cannot be allowed. Hence, motion is dismissed.

(D.G. KARNIK, J)